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No. 10-74

In the Supreme Court of the United States

JAVIER RIVERA AQUINO, SECRETARY,
PUERTO RICO DEPARTMENT OF AGRICULTURE,
ET AL., PETITIONERS

v.

SUIZA DAIRY, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

SUPPLEMENTAL BRIEF FOR THE PETITIONERS

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The federal government's position in this case is thoroughly mystifying. The government primarily contends that this Court's review is unnecessary because the court of appeals reached the right result in refusing to afford sovereign immunity. Specifically, the government asserts that the relief ordered by the district court, while requiring the Commonwealth of Puerto Rico to compensate respondents for past constitutional injuries, was not monetary. That will come as news to the people of Puerto Rico, who, as a result of the district court's order, have been paying an extra 1.5¢ on every quart of milk they buy. But more fundamentally, the government's position, like the court of appeals' decision, cannot be recon-

ciled with the settled principle that the relevant inquiry for purposes of sovereign immunity is whether liability would ultimately fall on the sovereign—not whether the sovereign would be the ultimate source of the funds used to satisfy that liability. Although the government also reiterates some of the vehicle arguments made by respondents, those arguments—which the Court presumably considered before it called for the government's views—are as meritless now as when they were initially raised.

Given the obvious flaws in the government's arguments, one is left with the sense that the government does not want the Court to grant review in this case, but without a good sense of the reasons why. As the amicus participation of a majority of the States reflects, the court of appeals' decision presents an exceptionally important constitutional issue—and, if that decision is allowed to stand, it will open up a dangerous loophole in the doctrine of sovereign immunity, by allowing a plaintiff to seek relief previously understood to be foreclosed by sovereign immunity under the guise of an *Ex parte Young* action. The decision below is inconsistent with decisions both of this Court and of other circuits. That inconsistency warrants further review and correction.

A. The Court Of Appeals' Decision Conflicts With The Decisions Of This Court And Other Circuits

1. a. The federal government does not directly defend the court of appeals' holding that a federal court can order retrospective relief in an action under *Ex parte Young*, 209 U.S. 123 (1908), as long as the necessary funds do not come directly from the general treasury. See Pet. App. 25a-26a. Indeed, the government conspicuously does not argue that a court could directly impose the mechanism that the Commonwealth adopted to

comply with the district court's order: namely, the 1.5¢ surcharge on every quart of milk sold in Puerto Rico. Instead, the government contends (Br. 6-10) that the relief ordered by the district court was not monetary relief for purposes of *Ex parte Young* because the Commonwealth *could* have complied with the order by taking some other action to raise the necessary money: for example, by adopting a regulation raising the maximum price that processors were allowed to charge for milk.

To state that contention is to refute it. As this Court has repeatedly explained, the exception carved out in *Ex parte Young* for suits against officials does not extend to claims for "[r]elief that in essence serves to compensate a party injured in the past." *Papasan* v. *Allain*, 478 U.S. 265, 278 (1986). It is undisputed that the district court ordered the Commonwealth to provide compensation, in the form of money, for respondents' past constitutional injuries—and the government does not suggest otherwise. See Pet. App. 197a. Admittedly, the district court did not order the Commonwealth to come up with the funds through any particular means, but instead allowed it to raise the funds "through * * * any * * * available mechanism of its choosing." *Ibid.* But regardless of the ultimate source of the funds, the relief that was ordered was monetary by any definition, because the Commonwealth was required to take action to generate money that would be used to compensate respondents.

Indeed, money not only is already being collected from Puerto Rico consumers, but is being directly retained by respondents themselves. See Pet. 4.[1] Given

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[1] As the government notes (Br. 15-16), the parties have disputed whether the money should instead be held in a segregated account by the Milk Industry Development Fund. Neither the government

that money is actually changing hands as a result of the district court's order, it blinks reality to conceive of the relief as anything but monetary. Even the court of appeals recognized as much when it noted that, under the Commonwealth's chosen mechanism, "the *money* in question would come directly from consumers of milk in Puerto Rico." Pet. App. 26a (emphasis added).

Crucially, the federal government does not dispute that, no matter what mechanism it chose for complying with the district court's order, the Commonwealth would ultimately be responsible if the chosen mechanism raised insufficient funds to compensate respondents for its past constitutional violations. If, for example, the Commonwealth raised the maximum price that processors were allowed to charge but milk sales actually fell as a result, the Commonwealth would be on the hook for any ensuing shortfall. See Pet. App. 64a (Lynch, C.J., dissenting from denial of rehearing en banc).

Under this Court's sovereign-immunity jurisprudence, that is the beginning and end of the inquiry. Most notably, in *Regents of University of California* v. *Doe*, 519 U.S. 425 (1997), the Court unanimously held that, for purposes of sovereign immunity, "it is the [sovereign] entity's potential legal liability * * * that is relevant"—not the source of the funds used to satisfy the liability. *Id.* at 431. That principle, in turn, is rooted in the broader principle that sovereign immunity protects against "the indignity of subjecting a [sovereign] to the coercive process of judicial tribunals at the instance of private parties." *Puerto Rico Aqueduct & Sewer Auth.*

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nor any of the parties, however, has taken the position that whether the money is so held is material to the sovereign-immunity analysis.

v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993) (citation omitted).

Although *Doe* was the most-cited case in the petition for certiorari (and the principal authority on which Chief Judge Lynch relied in dissent below), *the federal government does not so much as cite it, let alone distinguish it, in its brief to this Court.* That would be remarkable enough in a brief filed by a private litigant. But in a brief filed by the Solicitor General, it is simply astounding. And it is all the more astounding because the government participated in *Doe* as an amicus curiae *on the side of the entity seeking immunity.* See Oral Arg. Tr. at 18-19, 20, *Doe*, *supra* (Dec. 2, 1996) (argument of Assistant to the Solicitor General Blatt) (contending that, "as a State entity[,] * * * it is the university who is subject to the coercive enforcement powers of the court," "is the party against whom judgment is sought," and "is on the hook for the judgment"). The government disrespects the Court when it fails to explain how its position here can be reconciled either with its own position in *Doe* or, more importantly, with the Court's unanimous reasoning in that case.

In the portion of its brief arguing that the relief ordered by the district court was not monetary (Br. 6-9), the only case the government cites is *Ex parte Young* itself. But *Ex parte Young* is readily distinguishable, because it involved "a suit against state officials * * * to enjoin enforcement of a railroad commission's order requiring a reduction in rates." *Verizon Md. Inc.* v. *Public Service Comm'n*, 535 U.S. 635, 646 (2002). Unlike respondents here, the plaintiffs in *Ex parte Young* did not seek an order requiring any state actor to compensate them for a past violation. Permitting relief of the type respondents are seeking would entirely erode the distinction between suits permitted by *Ex parte Young* and

suits barred by sovereign immunity—and would thereby "effectively eliminate the constitutional immunity of the States." *Pennhurst State Sch. & Hosp.* v. *Halderman*, 465 U.S. 89, 105 (1984).

b. The federal government alternatively suggests (Br. 12), but stops short of affirmatively arguing, that the relief at issue here is permissible in an *Ex parte Young* action because it is prospective. For purposes of *Ex parte Young*, however, relief is impermissibly retrospective whenever it would compensate a plaintiff for a past violation. See, *e.g.*, *Papasan*, 478 U.S. at 278. And it could not be clearer that that is what the district court awarded. See Pet. App. 197a.

The government hints (Br. 12) that the analysis may operate differently in the ratemaking context. To be sure, in that context, it is possible to imagine a situation in which it is difficult to disaggregate the prospective and retrospective components of court-ordered relief. In this case, however, there is no such difficulty, because the district court ordered bifurcated relief that neatly tracks the distinction between permissible prospective and impermissible retrospective relief: revisions to the regulatory regime, which will allow respondents to recover a higher rate of return going forward, and the relief at issue here, which enables respondents to recover for constitutional violations dating back to 2003 until the revised regulatory regime takes effect. See Pet. App. 197a. By its terms, the latter relief is retrospective, because it seeks to compensate respondents for past violations.[2]

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[2] Because the prospective relief was designed to be sufficient on its own to remedy any ongoing constitutional violation, the retrospective relief cannot plausibly be viewed as a "necessary step[]" in

Relying on *Green* v. *Mansour*, 474 U.S. 64 (1985), the government further contends (Br. 11) that retrospective *non-monetary* relief is available in an *Ex parte Young* action. Of course, that contention is relevant only if the relief at issue here is correctly characterized as non-monetary—but it is in any event meritless. In *Green*, the Court rejected the plaintiffs' claims not only for retrospective declaratory relief against a state official, but also for retrospective "notice relief," on the ground that such relief "is not the type of remedy designed to prevent ongoing violations of federal law" and therefore could not be "order[ed] * * * as an independent form of relief." 474 U.S. at 71. And since *Green*, the Court has consistently taken the position that "the exception [of *Ex parte Young*] * * * applies only to prospective relief [and] does not permit judgments against state officers declaring that they violated federal law in the past." *Metcalf & Eddy*, 506 U.S. at 146; cf. *Verizon*, 535 U.S. at 645 (permitting claim for declaratory as well as injunctive relief where "no past liability of the State * * * is at issue").

2. The federal government contends that this case does not implicate a circuit conflict on the ground that "petitioners can comply with the district court's order without using any commonwealth funds." Br. 13. In so contending, however, the government misapprehends the nature of the circuit conflict. Numerous courts of appeals have held, both before and after this Court's decision in *Doe*, that the defense of sovereign immunity is available whenever a plaintiff is seeking retrospective relief that is monetary in nature, regardless of the source

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the implementation of the prospective relief. *Milliken* v. *Bradley*, 433 U.S. 267, 290 (1977).

of the funds used to provide that relief. See Pet. 10-15. In fact, since the government filed its brief, the District of Columbia Circuit has acknowledged the very conflict identified in the petition. See *Greater New Orleans Fair Housing Action Center* v. *HUD*, Nos. 10-5257 & 10-5269, 2011 WL 1327713, at *4 (Apr. 8, 2011). That acknowledgment confirms the existence of a live circuit conflict warranting the Court's review.

3. In our view, the court of appeals' decision is so out of step with this Court's sovereign-immunity precedents, and with the unbroken line of lower-court authority since *Doe*, that summary reversal would be appropriate. But at a minimum, the federal government's position reflects lingering confusion on the scope of sovereign immunity and thus illustrates the need for plenary review. If it is allowed to stand, the court of appeals' decision will serve as a template for a plaintiff who wishes to seek retrospective monetary relief from a sovereign; such a plaintiff will be able to do so through the simple expedient of bringing an *Ex parte Young* action and structuring his request for relief so that the requisite funds come (or could conceivably come) from a source other than the sovereign's treasury. See Pet. App. 63a (Lynch, C.J., dissenting from denial of rehearing en banc). It is for that reason that the court of appeals' decision is so troubling not only to the Commonwealth of Puerto Rico, but also to the twenty-six States that are supporting the petition for certiorari.[3] As Chief Judge Lynch noted, the "serious issues" presented by this case "deserve [the] attention" of the Court. *Id.* at 54a, 56a.

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[3] By contrast, the decision below is of only limited importance to the federal government in light of the broad statutory waivers of its immunity. See, *e.g.*, 28 U.S.C. 1346(b), 1491.

B. This Case Is An Optimal Vehicle For Consideration Of The Question Presented

The federal government also contends (Br. 13-17) that this case would be an inappropriate vehicle for consideration of the question presented. For the most part, the reasons it cites are duplicative of those identified by respondents, which have already been addressed in petitioners' reply brief. Only two points warrant additional response.

1. In the span of just six pages, the government argues both that petitioners are raising the sovereign-immunity issue too late (because they did not appeal from the denial of their motion to dismiss) and that petitioners are raising the issue too early (because they could raise it after the district court enters final judgment). See Br. 10, 13-16. The obvious inconsistency between those arguments is a sufficient basis for rejecting them out of hand. But each argument also lacks merit on its own terms.

As to the argument that petitioners are raising the sovereign-immunity issue too late: assuming that petitioners could have taken an appeal as of right at the motion-to-dismiss stage, petitioners' failure to do so was entirely understandable. In rejecting their sovereign-immunity objection, the district court reassured petitioners that respondents were merely "seeking a prospective injunctive relief" and were "not seeking damages nor a monetary compensation." Pet. App. 214a. It was only after the district court held the Commonwealth liable for past violations, and ordered it to come up with funds to cover that liability, that it became clear that respondents' claim for retrospective monetary liability remained alive. See Second Am. Compl. ¶ 92, at 39. Petitioners have diligently litigated the sovereign-immunity issue ever since.

As to the argument that petitioners are raising the sovereign-immunity issue too early: there is no valid reason why the Commonwealth should have to wait until final judgment before taking an appeal on that issue. In permitting interlocutory appeals from rulings on sovereign immunity, this Court explained that the benefit of sovereign immunity would be lost if a defendant could not invoke it until after trial. See *Metcalf & Eddy*, 506 U.S. at 143-144. And the argument that the Commonwealth should have to wait until final judgment is a bit rich coming from the federal government, which has raised sovereign-immunity objections at every conceivable stage of litigation—including the preliminary-injunction stage. See, *e.g.*, *United States* v. *Bedford Associates*, 618 F.2d 904, 913 (2d Cir. 1980).

The government suggests (Br. 15-16) that further review would be premature in this case because the ongoing proceedings below could affect the analysis on the question presented. In the order under review, however, the district court definitively held that respondents had suffered past and ongoing constitutional violations, see Pet. App. 192a, and ordered the Commonwealth to come up with funds to compensate respondents for those past violations, see *id.* at 197a. By contrast, the ongoing proceedings in the district court (and an interlocutory appeal recently noticed by petitioners) are focused on the details of how to calculate the rate of return to which respondents will be entitled. See, *e.g.*, Opinion and Order, Dist. Ct. Dkt. No. 1804 (Jan. 3, 2011); Notice of Appeal, Dist. Ct. Dkt. No. 1868 (Feb. 2, 2011). Because the relief at issue here is in all relevant respects final and has in fact been implemented, the mere fact that proceedings are ongoing in the same case should not deter this Court's review.

2. Finally, the federal government contends (Br. 16-17) that the Court should deny review because it has not yet squarely held that Puerto Rico is entitled to sovereign immunity. The Court, however, can decide this case on the assumption that Puerto Rico is entitled to sovereign immunity—regardless of whether, as the government notes, "this case presents a substantive question of the scope of immunity." Br. 16. Like respondents, moreover, the government does not affirmatively dispute that Puerto Rico is entitled to sovereign immunity; to the contrary, the government hints that it is. See Br. 17.

To the extent that there is any residuum of uncertainty concerning Puerto Rico's entitlement to sovereign immunity, this Court could readily direct the parties to address that issue in their merits briefing. But however the Court chooses to proceed at the merits stage, it should not penalize the Commonwealth of Puerto Rico by relying on that residuum of uncertainty as a basis for denying certiorari where, as here, the Commonwealth seeks the Court's review on a generally applicable question concerning the scope of sovereign immunity. There can be no dispute that the question presented in this case is a substantial one of exceptional importance not only to Puerto Rico, but also to a majority of the States. To deny review simply because this case arises from Puerto Rico would not only leave the First Circuit's erroneous and far-reaching decision in place; it would work an affront to the Commonwealth and its people.

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The petition for a writ of certiorari should be granted.

Respectfully submitted.

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